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No. 94-379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC.,

Petitioners,

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY,

Respondents.

On Petition for A Writ of Certiorari
to The Court of Appeals of Texas
for the Fifth District of Texas at Dallas

REPLY BRIEF

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No. 94-379

IN THE

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v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY

Respondents.

On Petition for A Writ of Certiorari to The Court of Appeals of Texas for the Fifth District of Texas at Dallas

REPLY BRIEF

Petitioners Anheuser-Busch Companies, Inc. and Campbell Taggart, Inc. submit this reply in response to arguments first raised in respondents' brief in opposition.[1]

1. Respondents do not contest the fact that the lower court ruled on the identical issue this Court will shortly decide in *Gustafson v. Alloyd Co.*, No. 93-404, *cert. granted*, 114 S.Ct. 1215 (1994): whether section 12(2) of the federal Securities Act of 1933, 15 U.S.C. § 77*l*(2), applies to the private sale of all the stock of a corporation. Nor do respondents defend, in any manner, the merits of the Texas

[1] Petitioners' Rule 29.1 listing of parents and non-wholly owned subsidiaries is contained in the Petition at p.ii.

Court of Appeals' ruling on this crucial *Gustafson* issue regarding the scope of the anti-fraud provision of the federal statute. Instead, respondents contend solely that this Court has no jurisdiction over any federal Securities Act issue due to an allegedly independent and adequate state grounds under the Texas Securities Act. *See* Opposition ("Opp.") at 4.[2]

This contention is refuted by the court of appeals' own clear language, which demonstrates that its invocation of the state securities act was by no means independent of the court's interpretation of the federal act. On the contrary, on the potentially dispositive *Gustafson* issue, the lower court treated the state securities law as wholly *dependent* on the interpretation of section 12(2) of the federal act. Contrary to respondents' suggestion (Opp. 5), the Texas court did not look to construction of section 12(2) of the federal act as a "guide" to the proper construction of the state statute. Rather, the court ruled that federal law under section 12(2) controlled, stating unequivocally that the Texas anti-fraud provision "should be applied in accordance with our interpretation of the federal statute." Petition Appendix ("Pet. App.") A28.

If this Court's *Gustafson* decision reverses the Texas court's interpretation of section 12(2) of the federal statute, the state securities ground would necessarily also fall, for it is totally dependent on the federal ruling. On the crucial issue concerning the scope of the anti-fraud provisions, the Texas court did not even cite the applicable provision of the Texas Securities Act, which is Tex. Rev. Civ. Stat. Ann. art. 581-33 A(2) (Vernon Supp. 1994) (hereinafter "section 33

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[2] Respondents do not, and cannot, challenge this Court's jurisdiction on any other grounds. Petitioners timely filed in this Court after the Texas Supreme Court denied discretionary review and rehearing (Pet. App. A1-A2). Petitioners timely sought review in the Texas Supreme Court after the Court of Appeals denied rehearing and adhered to its June 9, 1993, ruling, which is the subject of the petition. *See* Supplemental Appendix to this Reply Brief ("Supp. App.") at Supp. App. A.

A(2)"). Nor did the court of appeals cite any state precedent of any type.[3] Instead, the lower court exclusively analyzed the language of section 12(2) of the federal Securities Act, its legislative history and its interpretation by federal courts. Pet. App. A24-A28.[4]

The court remarked in passing, without any explanation or analysis, that the Texas provision "is *arguably* broader than the comparable federal language." Pet. App. A28 (emphasis supplied). If the state court had intended to rely on the Texas statute independently from federal law, it surely would have used more definitive language. In any event, section 33 A(2) of the state securities law and section 12(2) of the federal statute contain virtually identical wording. Compare Pet. 2-3 with Opp. 1a-2a. The absence of

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[3] Respondents stress (Opp. 9) that the lower court took issue with a ruling of the Texarkana court of appeals in *Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 307 (Tex. App. Texarkana), *judgment set aside and cause remanded for rendition of agreed judgment*, 840 S.W.2d 384 (Tex. 1992). But the court did not refer to the Texarkana ruling when discussing the scope of the anti-fraud provisions, but only when addressing the secondary question of a buyer's right to rescission. Reference to the Texarkana ruling is of no import, in any event, because the court below based even its rescission ruling squarely on federal law. See n. 4, *infra*.

[4] The state court's treatment of the two remaining securities questions raised by the Petition was equally dependent upon its federal analysis. The federal and state anti-waiver provisions were declared to be "essentially the same," and the court for this reason was compelled to "adopt and follow" the federal precedent interpreting the federal law. Pet. App. A11-A12. Similarly, the federal and state statutes contain "virtually the same wording" regarding the award of rescission. Pet. App. A23. Although the court once referred to the various federal precedents as "reliable guides" to application of the state provision, it also characterized them as "the controlling federal cases." Pet. App. A23. Accordingly, the court determined that "the Texas provision should be applied in accordance with the federal provision." Pet. App. A24.

the phrase "prospectus or oral communication" in the Texas statute could not justify construing the state law radically differently than its federal counterpart.[5] As respondents themselves note (Opp. 11), the Texas courts have rarely even dealt with the Texas securities statute. Certainly there is no precedent interpreting the Texas anti-fraud provision as deviating in any respect from section 12(2) of the federal statute.

That the Texas and federal anti-fraud provisions are interpreted uniformly is entirely appropriate because section 33 A(2) of the Texas act was purposely patterned after section 12(2). *See* Bateman, Securities Litigation: The 1977 Modernization of Section 33 of the Texas Securities Act, 15 Hous. L. Rev. 839, 844-45 (1978). The drafters' comments accompanying amendments to the state act explain that the Texas legislature amended the state anti-fraud provision in 1977 precisely in order to "bring [it] closer to" the federal provision. Committee on Securities and Investment Banking of the Section on Corporation, Banking and Business Law of the State Bar of Texas, Comment - 1977 Amendment, *reprinted following* Tex. Rev. Civ. Stat. Ann. art 581-33 (Vernon Supp. 1994).[6] Analysis of the federal statutory

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[5] Contrary to respondents' contentions (Opp. 8 n.7), petitioners never made a public offering of stock; indeed, it has been undisputed that the sale was not subject to registration requirements under the securities laws. Talking to a few prospective buyers does not constitute a public offering. Nor did the jury find that the sale involved a "prospectus" within the meaning of the federal law, a legal question that in any event has no relevance to the applicability of the securities laws to this transaction.

[6] Respondents improperly rely (Opp. 7) on a drafters' comment concerning Article 33D of the Texas Act, regarding application to the secondary market. That comment, however, expressly applies only to suits "against non-selling issuers that register" and addresses the provision protecting such an issuer from liability for more than the public price of the registered offering. The comment simply has no application to the question here, which

scheme, in fact, wholly applies to the state scheme because other key provisions of Texas' securities laws also closely follow the federal laws. For example, section 29C of the Texas Securities Act (Tex. Rev. Civ. Stat. Ann. art. 581-29C (Vernon Supp. 1994)) contains the identical phrases of section 17(a) of the 1933 Act ("directly or indirectly" and "any device, scheme, or artifice to defraud"); as recognized in *United States v. Naftalin*, 441 U.S. 768 (1979), such language distinguishes section 17(a) from the rest of the Act. Likewise, just as the elements of section 10(b) of the 1934 Act are more stringent than those under section 12(2), so are the elements under section 27.01 of the Texas Business and Commerce Code (the Texas corollary to 10(b)) more stringent than under section 33 A(2).

The lower court thus justifiably linked the Texas anti-fraud provision with the proper interpretation of the federal Securities Act, and such linkage provides this Court with jurisdiction. Even if the state court decision was based in part on state law, the state ruling "fairly appears to rest primarily on federal law." *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The court's treatment of the relationship between state and federal statutes demonstrates that its state law determination would have been different had the court understood the correct interpretation of federal law. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 152 (1984). Where, as here, the court's state law analysis "depended entirely on its understanding of the meaning of [federal law]," there is no independent and adequate state grounds for the state court's decision. *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.9 (1981). In these circumstances, the state courts "deserve to be made aware of the proper [and] significant interpretation of the intertwined federal law," which provided the sole support for the rulings under state law. *Id.*

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involves a private sale of company stock without any public offering or requirement of registration.

Particularly where, as here, this Court is about to rule in another case on the primary federal issue decided below, there would be no justification for denying review of this state court decision.[7] A ruling in favor of the *Gustafson* petitioners would eliminate the entire rationale for the ruling by the Texas Court of Appeals in this case.

2. Ignoring abundant authority that *both* parties must be returned to the *status quo ante* in order for the remedy of rescission to be applicable (*see* Pet. 21-22), respondents would have the Court create a new law of rescission. According to respondents, (Opp. 13), under the 1933 Act the only rescissory requirement is that the buyer tender the security to the seller, regardless of whether it can return the asset it bought - - namely, the company. On the contrary, the ability to tender the stock is but a threshold

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[7] Respondents baldly charge (Opp. 6, n.5) that petitioners would be bound by the prior state law rulings on any remand because they somehow failed to challenge the applicability of the state statute upon rehearing before the Texas Court of Appeals or in the application for writ of error to the Texas Supreme Court. On the contrary, however, petitioners properly addressed the scope of both the federal and state securities laws at every necessary step below. *See* Excerpt from Appellants' Brief before the Texas Court of Appeals (Supp. App. B); Excerpt from Appellants' Motion for Rehearing before the Texas Court of Appeals (Supp. App. C); and Excerpt from Appellants' Application for Writ of Error to the Texas Supreme Court (Supp. App. D). Respondents' citations merely stand for the uncontroversial proposition that litigants must specify their points of error. *See* Tex. R. App. P. 131(e); *Albright v. City of Houston*, 677 S.W.2d 487, 488 (Tex. 1984); *Sullivan v. University Interscholastic League*, 616 S.W.2d 170, 173 (Tex. 1981). Petitioners properly specified their points of error below regarding the intertwined federal and state securities issues, clearly meeting the standard of directing "the attention of the court to the error relied upon." Tex. R. App. P. 131(e). Respondents cite no authority that even suggests that petitioners' points of error before the appellate courts were deficient.

requirement for section 12(2)'s rescissory remedy.[8] Indeed, respondents have no authority for their radical departure from the well-established principles of rescission. The cases they cite (Opp. 12-16) merely treat the question of the return of an asset that is more or less valuable than it was when purchased. *None* holds that a return to the *status quo* is unnecessary.[9]

Respondents are forced to argue that the *status quo* is irrelevant because they cannot return any part of the asset they purchased, a company they placed in bankruptcy after admittedly making several ill-fated changes to the business. Under these circumstances, merely returning the paper stock in exchange for return of the entire purchase price cannot possibly be considered a fair remedy. As recognized by the courts that have held that the common law requirements for rescission apply to section 12(2) (*see* Pet. 21-22), there comes a point when rescission is no longer appropriate. Because there is nothing left of the purchased company but worthless paper stock, that point has been reached in this case.[10]

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[8] The cases cited by respondents, *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1034 (2d Cir. 1979), *Chapman v. Dunn*, 414 F.2d 153, 160 (6th Cir. 1969), and *Stadia Oil & Uranium Co. v. Wheelis*, 251 F.2d 269, 274 (10th Cir. 1957), do not hold otherwise. Each involves issues of how and when tender is to be made for purposes of section 12(2). These cases correctly hold that a tender of the stock is a prerequisite for rescission under section 12(2) but do not suggest that such a tender is the only requirement.

[9] Respondents note that in *Casella v. Webb*, 883 F.2d 805 (9th Cir. 1989) the court allowed section 12(2) rescission when the entity was bankrupt. That case, however, involved the purchase of some shares in a limited partnership, not the entire company, as in this case.

[10] The result is the same under section 33 A(2) of the Texas statute, which explicitly provides that the purchaser "may sue either at law or *in equity for rescission*," thus incorporating the common law equitable principles of rescission. Tex. Rev. Civ. Stat. Ann. art. 581-33 A(2) (Vernon Supp. 1994) (emphasis added).

3. The Texas court of appeals properly held that when the parties entered a mutual release three months after the sale, they intended for the release to cover all of the claims now at issue in this litigation. (Pet. App. A9-11). All of respondents' claims relate to alleged acts which took place before they bought the company. Under clear federal precedent, the anti-waiver provision of the 1933 Act does not nullify release of such fully mature, but unknown securities claims. *See* Pet. 23-25. Respondents are unable to overcome the sound reasoning of the Ninth Circuit in *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337 (9th Cir. 1992), a case remarkably similar to the one at hand. What we have here is the release of fully mature claims in an arms-length transaction, where all parties are represented by counsel and have equal access to information, with the payment of substantial consideration to resolve present and future disputes and to buy peace. Contrary to respondents' contentions (Opp. 18), it makes no difference that the parties in *Petro-Ventures* were in litigation when they executed their release. In that case and ours, the parties were in a dispute, and came to an agreement. Here, as in *Petro-Ventures*, the buyers "were not so concerned with protecting their rights as investors as they were with establishing a general peace." 967 F.2d at 1342. Under these circumstances, the release of respondents' existing securities claim, whether known or unknown, is entirely valid.

Respondents inappropriately rely (Opp. 17) on a jury finding concerning when, for statute of limitations purposes, respondents *should* have known of their claims in the exercise of reasonable diligence. That question is simply irrelevant to the issue of the release. Respondents released all claims, known and unknown, and never made any factual defense that they were prevented from knowing --

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Under Texas common law, rescission is unavailable unless the *status quo* can be restored. *See DePuy v. Bodine*, 509 S.W.2d 698, 699 (Tex. Civ. App. - San Antonio 1974, writ ref'd n.r.e.).

i.e., *could* not have known -- of their existing claims. All parties and the trial court, therefore, agreed that the applicability of the release was strictly a legal question.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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October 1994

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SUPPLEMENTAL APPENDIX A

ORDER ISSUED AUGUST 2, 1993

IN THE

Court of Appeals

Fifth District of Texas at Dallas

No. 05-92-00389-CV

ANHEUSER-BUSCH COMPANIES, INC. and CAMPBELL TAGGART, INC., Appellants

v.

SUMMIT COFFEE COMPANY and THE DUNNAM-SNYDER COMPANY, Appellees

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ORDER

Before Justices Baker, Chapman, and Barber

We **OVERRULE** appellees' Motion for Rehearing;

We **OVERRULE** appellants' Motion for Rehearing.

WILL BARBER
JUSTICE

SUPPLEMENTAL APPENDIX B

No. 05-29-00389-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

ANHEUSER-BUSCH COMPANIES, INC. and
CAMPBELL TAGGART, INC.,

Appellants,

v.

WILLIAM K. SNYDER, et al.,

Appellees.

On Appeal from the 160th
Judicial District Court of Dallas County

CORRECTED BRIEF FOR APPELLANTS ANHEUSER-BUSCH COMPANIES, INC., and CAMPBELL TAGGART, INC.

[EXCERPT]

POINTS OF ERROR

I. SUMMIT AND DUNNAM SNYDER RELEASED THEIR CLAIMS.

POINT OF ERROR NO. 1

The trial court erred as a matter of law in rendering judgment in favor of Dunnam Snyder and Summit because their claims are barred by a signed release supported by substantial consideration.

* * *

III. SUMMIT MAY NOT OBTAIN RESCISSION

POINT OF ERROR NO. 4

The trial court erred as a matter of law in disregarding the jury finding that the parties could not be returned to the status quo ante in awarding Summit rescissionary damages. (Jury Question Nos. 15B, 18, 19, 21, 22, 30 and 31, Tr. at 717, 724-725, 728-729, 741, 745-46).

POINT OF ERROR NO. 5

The trial court erred as a matter of law in rendering judgment against Campbell Taggart and Anheuser-Busch under § 12(2) of the Federal Securities Act of 1933 and under Art. 33A(2) of the Texas Securities Act because those statutes are inapplicable to the secondary trading stock transaction in this case.

SUPPLEMENTAL APPENDIX C

No. 05-92-00389-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

ANHEUSER-BUSCH COMPANIES, INC. and
CAMPBELL TAGGART, INC.,

Appellants,

v.

SUMMIT COFFEE COMPANY and
THE DUNNAM-SNYDER COMPANY,

Appellees.

On Appeal from the 160th
District Court of Dallas County

APPELLANTS' MOTION FOR REHEARING

[EXCERPT]

POINTS OF ERROR

POINT OF ERROR ONE

THE COURT OF APPEALS ERRED IN HOLDING THAT SUMMIT DID NOT RELEASE ITS SECURITIES CLAIMS. [Slip Op. pgs. 9-13] [Appellants' Motion pgs. 1-8]

POINT OF ERROR TWO

THE COURT OF APPEALS ERRED IN HOLDING THAT SUMMIT IS ENTITLED TO RESCISSION NOTWITHSTANDING THE JURY FINDING THAT THE PARTIES COULD NOT BE RETURNED TO THE STATUS QUO ANTE. [Slip Op. pgs. 23-27] [Appellants' Motion pgs. 8-10]

POINT OF ERROR THREE

THE COURT OF APPEALS ERRED IN HOLDING THAT § 12(2) OF THE FEDERAL SECURITIES ACT OF 1933 IS APPLICABLE TO THE SECONDARY MARKET TRANSACTION IN THIS CASE. [Slip Op. pgs. 23-27] [Appellants' Motion pgs. 11-14]

SUPPLEMENTAL APPENDIX D

No. D-4121

IN THE
SUPREME COURT OF TEXAS

ANHEUSER-BUSCH COMPANIES, INC. and
CAMPBELL TAGGART, INC.,
Respondents/Cross Petitioners,

v.

SUMMIT COFFEE COMPANY and
THE DUNNAM-SNYDER COMPANY,
Petitioners/Cross Respondents.

On Appeal from the Court of Appeals
for the Fifth District of Texas at Dallas

APPLICATION FOR WRIT OF ERROR

[EXCERPT]

I. **THE COURT OF APPEALS ERRED IN CONCLUDING THAT SUMMIT DID NOT RELEASE ITS SECURITIES CLAIMS (Point of Error 1).**

II. **THE COURT OF APPEALS ERRED IN CONCLUDING THAT SUMMIT IS ENTITLED TO RESCISSION NOTWITHSTANDING THE JURY FINDING THAT THE PARTIES CANNOT BE RETURNED TO THE STATUS QUO ANTE (Point of Error 2).**

III. **THE COURT OF APPEALS ERRED IN CONCLUDING THAT SECTION 12(2) OF THE FEDERAL SECURITIES ACT OF 1933 IS APPLICABLE TO A PRIVATE SECONDARY MARKET TRANSACTION (POINT OF ERROR 3).**

In addition to the unavailability of rescission, Summit cannot recover under section 12(2) of the 1933 Securities Act or its Texas analog because those statutes do not apply to private, secondary market transactions. The court of appeals erroneously held to the contrary. Section 12(2) applies only to initial offerings, not to after-market transactions. The Texas statute, section 33(A)(2), is likewise limited.